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Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 186

1963

ISTHMIAN LINES, INC.,

Petitioner,

against

GEORGE E. STREET,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOSEPH M. CUNNINGHAM,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

VERNON S. JONES,
HENRY J. C BRIEN,
Of Counsel

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
FACTS	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	6
1. *The Importance of the Question*	6
2. *Conflict with the Principles of the Warranty of Seaworthiness Set Forth in Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539 (1960)	7
3. *Conflict with the Decisions of the Courts of Appeal for the First, Fifth and Ninth Circuits*	8
4. *The Various Panels of the Second Circuit Court of Appeals disagree as to the meaning of seaworthiness, Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539 (1960)	9
5. *A Dismissal of the Unseaworthiness Claim Would Not Have Interfered With Plaintiff's Constitutional Guarantee of a Jury Trial*	13
CONCLUSION	16

INDEX TO APPENDIX.

Opinion of the Court of Appeals	A1

TABLE OF CASES.

	PAGE
Arena v. *Luckenbach Steamship Co.*, 279 F. 2d 186 (1 Cir., 1960); cert. den., 364 U. S. 895, (1960)	8
Blier v. *United States Lines*, 286 F. 2d 920, (2 Cir., 1961); cert. den., 368 U. S. 836, (1961)	13
Brady v. *Southern Ry. Co.*, 320 U. S. 476, (1943)	16
Eckenrode v. *Pennsylvania Railroad Co.*, 335 U. S. 329, (1948)	16
Ezekial v. *Volusia S.S. Co.*, 297 F. 2d 215, (2 Cir., 1961); cert. den., 369 U. S. 843, (1962)	12, 13
Ferguson v. *Moore McCormack Lines, Inc.*, 352 U. S. 521, (1957)	5
Galloway v. *United States*, 319 U. S. 372 (1943)	13
Guiterrez v. *Waterman Steamship Corp.*, United States Supreme Court, decided May 13, 1963, (not yet officially reported)	7
Harris v. *Pennsylvania Railroad Co.*, 361 U. S. 15, (1959)	13
Hooper v. *Terminal Steamship Co.*, 296 F. 2d 281, (2 Cir., 1961); cert. den., 369 U. S. 843, (1962)	13
Lieberman v. *Matson Navigation Company*, 300 F. 2d 661, (9 Cir., 1962)	9
Mitchell v. *Trawler Racer, Inc.*, 362 U. S. 539, (1960)	6, 7, 9, 10, 11, 12, 13
Moore, Administratrix v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573, (1951)	15, 16
Morales v. *City of Galveston*, 291 F. 2d 97, (5 Cir., 1961), affmd., 370 U. S. 165, (1962)	8
Nuzzo v. *Rederi A/S Wallenco*, 304 F. 2d 596, (2 Cir., 1962)	12, 13
Pinto v. *States Marine Lines*, 296 F. 2d 1, (2 Cir., 1961), cert. den., 369 U. S. 843, (1962)	10, 13
Puddu v. *Royal Netherlands S.S. Corp.*, 303 F. 2d 752, (2 Cir., 1962); cert. den., 371 U. S. 840, (1962)	11

PAGE

Richter v. *Mathiesen's Tanker Industries*, 297 F. 2d 494 (2 Cir., 1961); cert. den., 369 U. S. 843, (1962) 13

Schulz, Administratrix v. *Pennsylvania Railroad Co.*, 350 U. S. 523, (1956) 13

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, (1944) 13

STATUTES.

28 USC 1254 (1) 2

46 USC 688 16

45 USC 51 16

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on January 30, 1963 which affirmed a jury verdict in favor of the plaintiff and against the petitioner herein for damages in the amount of $35,000. The Court of Appeals denied the petition for rehearing and rehearing *en banc* on March 11, 1963.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit (R3b), pages A1 to A8 of the Appendix hereto, is reported at 313 F. 2d 35. The petition for rehearing and rehearing *en banc* was denied without opinion.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on January 30, 1963 (R11b, 12b). A timely petition for rehearing and rehearing *en banc* was filed on February 14, 1963, and was denied without opinion on March 11, 1963. This petition for a writ of certiorari is filed less than 90 days after the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

Questions Presented.

1. Is a vessel unseaworthy because an engineering officer of that vessel is injured while using a tool which is "reasonably fit" for the purpose for which he selected it and used it because an injury occurred during such use.

2. Is there sufficient basis to support a jury verdict that a vessel is unseaworthy because of a tool which admittedly was reasonably fit and adequate, when the only probative evidence on the subject was the happening of the accident and testimony that another tool was preferred and proper for the task although there was a complete absence of evidence that the tool used was in any way improper for the task or was defective.

Facts.

The principal facts, upon which this petition is based, were never in dispute. The plaintiff was an experienced engineering officer who had been going to sea for over 20 years. On the morning of his accident the first assistant engineer assigned the plaintiff the task of opening view plates of a large boiler. The vessel was at the end of a bareboat charter to the defendant and the owner's representatives were making a "re-delivery" survey. The view plates were being opened to allow these representatives to examine the inside of the boiler (R11a).

While the plaintiff was doing this job he was approached by two strangers whom he presumed to be longshoremen (R5a). They presented a small turnbuckle which the plaintiff knew was not part of the ship's equipment and asked him to cut the end off (R17a). In the plaintiff's sea career he had never before done work in the vessel's engine room without orders but thinking that cutting the end off the turnbuckle would assist cargo operations he decided to leave his assigned job and cut the end off the turnbuckle.

The plaintiff and the two strangers left the boiler and went to the tool room. The plaintiff was looking for a hacksaw (R6a). But the hacksaws were not hanging in their accustomed place. So he went to the machine shop but found it locked (R7a). The plaintiff next proceeded to the engineer's log desk where the key to the machine shop usually hangs on a peg (R5a). It was not there.

It developed that the first assistant had locked up the tools because the night before some valuable tools were found in a large sack secreted away awaiting an opportune time for removal from the ship (R131a). Consequently, the vessel's tools, including the hacksaws were locked in

the machine shop and the key removed from its usual convenient place (R131a).

When the plaintiff did not find the key in its usual place he stopped the first assistant engineer who was busy with his own work and asked for the key. The first assistant told the plaintiff that he had put the key in his room (R5a). The plaintiff did not attempt to get the key but testified that he knew from experience that the first assistant's room would be locked (R19a). The plaintiff and the two strangers returned to the tool room and found a cold chisel. The plaintiff had a hammer with him because all the tools necessary for the regular contemplated work for the day had been supplied to the plaintiff and the other of the engineering personnel (R12a).

The cold chisel which the plaintiff selected was manufactured for the specific purpose of cutting through metal such as the end of this turnbuckle (R3a). The chisel was supplied to the engineering personnel on the ship for this purpose. The plaintiff had used it for the same type of work before (R26a). There was absolutely no defects in the chisel (R21a). Concededly it was "reasonably fit for the purpose intended" (R21a, R22a).

The plaintiff put the ship's anvil on the deck, placed the small turnbuckle on the flat top of the anvil and held it down with one foot (R20a). He struck the chisel with a hammer and made a cut through the neck of the turnbuckle. Unfortunately the end of the turnbuckle being cut off bounced off the anvil into the plaintiff's eye (R21a, R6a).

STATEMENT.

At the end of the plaintiff's evidence the trial judge dismissed the unseaworthiness claim. However, at the end of the entire case the trial judge reconsidered this action

and permitted both the unseaworthiness and negligence claims to go to the jury. The trial judge relied on no evidence to support the unseaworthiness cause except the fact that the jury could, from their own knowledge and experience, have inferred that the cold chisel was not "reasonably safe". This Court's opinion in *Ferguson* v. *Moore McCormack Lines, Inc.*, 352 U. S. 521, (1957), was the basis for the trial court's action.

The reliance of the trial court and the Court of Appeals on the *Ferguson* case as authority for submitting the case to the jury was misplaced. In the *Ferguson* case there was no issue involving the reasonable fitness of the butcher knife. It was conceded by both parties that the knife was not a reasonably fit tool with which to dig hard ice cream.

The question involved in that case was whether or not the defendant shipowner had been negligent in not furnishing the plaintiff with a tool other than a butcher knife. The defendant in *Ferguson* admitted the impropriety of the butcher knife, but contended that because it was obviously not a fit tool to chop through hard ice cream, it was not reasonably foreseeable that the plaintiff would attempt to use it for such purpose. This Court in affirming the jury verdict in Ferguson's favor held that the jury's experience could be relied on to determine whether a reasonable man might have used a butcher knife to chop the ice cream under circumstances where no other tool was available. In other words this Court in *Ferguson* held that foreseeability is a matter for the jury. There was no question of seaworthiness involved in *Ferguson*.

Judge Hays in the instant case, failed to consider that there was no evidence concerning the cold chisel from which the jury could with reason, conclude that it was not a "reasonably fit" tool. Admittedly, based on the testimony of the first assistant engineer, there may have been a basis

for the jury to infer that a hacksaw was the "best" tool, but the warranty of seaworthiness does not put upon a shipowner the requirement that there be supplied the "best" or an "accident free" tool. According to this Court's teaching in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, (1960), a shipowner need only provide tools which are reasonably fit for their intended use. They need not be perfect nor need they be accident-free.

In holding that because there was testimony that the hacksaw was a proper tool, the jury could conclude that the cold chisel was "unseaworthy", Judge Hays loses sight of the "reasonably fit" concept of the warranty of seaworthiness and substitutes a requirement akin to a guarantee of safety.

Reasons for Granting the Writ.

1. *The Importance of the Question:*

Despite the apparent clarity with which this Court described the warranty of seaworthiness and the elements to be considered in its application in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539 (1960), various panels of the Court of Appeals for the Second Circuit are in apparently irreconcilable conflict—not only among themselves, but with other Courts of Appeals—as to what this Court meant when it spoke of the "divorcement of common law concepts of negligence" from seaworthiness; the shipowner's "absolute duty" and the concept of "reasonable fitness".

It is, therefore, of great importance to the shipping industry that this Court exercise its historic supervisory powers and settle the law in this field by redefining its holding on the maritime doctrine of seaworthiness as propounded in *Mitchell* and clarify the "reasonable fitness" concept of the doctrine.

Failure to do this now can only result in continuing disharmony and conflict and confusion in decisions emanating from a Court of Appeals located at the site of the heart of the shipping industry, and which handles by far the greatest volume of maritime litigation involving the application of the warranty of seaworthiness.

2. *Conflict with the Principles of the Warranty of Seaworthiness set forth in Mitchell* v. *Trawler Racer, Inc., 362 U. S. 539 (1960).*

Judge Hays' decision in the present case is not only in conflict with the majority of cases concerning the warranty of seaworthiness decided by the same Court of Appeals but is contra to this Court's holding on seaworthiness in *Mitchell* v. *Trawler Racer, Inc., (supra)*, and most recently in *Guiterrez* v. *Waterman Steamship Corp.*, United States Supreme Court, decided May 13, 1963, (not yet officially reported). In *Mitchell*, this Court pronounced the divorcement of common law concepts of negligence from the doctrine of seaworthiness and set forth—in what appeared to be clear and explicit language—the test to be applied in determining whether a shipowner had fulfilled the requirements of the warranty of seaworthiness. Mr. Justice Stewart, delivering the majority opinion of this Court in *Mitchell*, said:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances *reasonably fit for their intended use. The standard is not perfection, but reasonable fitness;* not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but *a vessel reasonably suitable for her intended service. Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336." (Emphasis supplied, at page 550).

Throughout the language used by Mr. Justice Stewart runs the unmistakable theme of reasonable fitness. It is an integrated part of the warranty. The duty upon the shipowner is absolute only to the extent that he must provide equipment which is reasonably suitable. If the occurrence of injury alone were sufficient to establish unseaworthiness, then the requirement would, in fact, be one of absolute perfection.

In the opinion below, Judge Hays concludes that because there was testimony that a hacksaw was a "proper" tool, a jury could conclude that a vessel was unseaworthy because some other tool was used although there was no testimony that the other tool was improper, inadequate or not reasonably fit for the very task for which the plaintiff selected it.

3. Conflict with the decisions of the Courts of Appeal for the First, Fifth and Ninth Circuits.

The Court of Appeals for the First Circuit in *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 186 (1960); cert. den., 364 U. S. 895 (1960), held that in a longshoreman's claim for injuries sustained aboard a vessel, there must be some evidence of a defect in the equipment involved in order to permit the plaintiff's case to go to a jury for a determination of the vessel's seaworthiness.

In *Morales* v. *City of Galveston*, 291 F. 2d 97 (1961), aff'd., 370 U. S. 165 (1962), the Court of Appeals for the Fifth Circuit in affirming a District Court's holding in favor of the respondent shipowner, discussed its understanding of the doctrine of seaworthiness set forth in *Mitchell* to mean that while the shipowner's duty to provide a seaworthy vessel is absolute, it is a duty only to furnish a vessel and appurtenances reasonably fit for the use intended.

More recently, the Court of Appeals for the Ninth Circuit in *Lieberman* v. *Matson Navigation Company*, 300 F. 2d 661, (1962), affirming the trial court's finding in favor of the defendant shipowner, set forth its understanding and application of the warranty of seaworthiness as described in *Mitchell* in the following language:

> "While it is true that the requirement to furnish a seaman a seaworthy vessel is absolute, it is untrue that this duty is limitless. 'The standard is not perfection, but reasonable fitness'. * * * The owner is not an insurer". (At page 662)

The opinion below is obviously in direct conflict with the holdings of this Court and the decisions of the Courts of Appeal for the First, Fifth and Ninth Circuit as well as the opinions of other panels of the Court of Appeals for the Second Circuit on the important question of whether the warranty of seaworthiness requires that a shipowner supply a "reasonably fit" tool or one which is foolproof.

4. *The Various Panels of the Second Circuit Court of Appeals disagree as to the meaning of seaworthiness, Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

This case clearly portrays the intra-circuit dispute in the Second Circuit concerning the application of this Court's holding on the warranty of seaworthiness in *Mitchell* v. *Trawler Racer, Inc.*, (*supra*). The recent decisions from that Court of Appeals are in irreconcilable conflict and indicate the gravity of this dispute.

One faction of that Court bluntly states that, based on policy considerations concerning the "humanitarian" purposes of the doctrine of seaworthiness, the *Mitchell* case is to be read as requiring the imposition of absolute liability upon the shipowner and that considerations of "reasonable fitness" should not be used.

Cases decided by other panels of the same Court of Appeals regard the warranty of seaworthiness as requiring that a vessel, its equipment, appurtenances and tools need only be "reasonably fit for their intended use".

Several recent decisions from the Court of Appeals for the Second Circuit clearly point up the intra-circuit conflict. In *Pinto v. States Marine Lines*, 296 F. 2d 1 (2 Cir.-1961); cert. den. 369 U. S. 843, (1962), the court held that the trial court's charge on unseaworthiness was in accord with the *Mitchell* opinion. Judge Friendly examined this Court's holding in *Mitchell* and concluded that:

> "* * * The Court was at pains to make clear that it was not going to the extreme of requiring any such absolute freedom of all parts of a vessel from all foreign substances at all times * * *. The Court said, ' * * * the owner is not obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.' " (At page 5)

Judge Clark, dissenting on the denial of the petition for a rehearing *en banc* in *Pinto*, in which he was joined by Judge Smith, arrived at an opposite understanding of this Court's meaning in the *Mitchell* opinion. Judge Clark felt that the manifest intent of this Court to safeguard human lives at sea could only mean that the Court intended to require absolute liability of the shipowner.

Judge Hays is apparently in accord with those who interpret Mitchell as requiring absolute liability regardless of "reasonable fitness". Judge Hays, in the opinion below, wrote:

> "* * * In the case at bar there is no defect in the tool selected, nor was the tool 'unfit' in the sense that it could not accomplish the task. *But as in the case at* bar, the jury could conclude from the circumstances

> of the accident that plaintiff 'had been furnished with no safe tool to perform his task.' "

Judge Hays thus pays lip service to *Mitchell*, but disregards the concept of "reasonable fitness" in holding that the happening of an accident itself may be sufficient to permit the jury to infer that a tool was not "safe". (Is this more than being "reasonably fit"?) There was no dispute that the chisel was "reasonably adequate" and was actually manufactured for the use for which the plaintiff selected and used it. Judge Hays acknowledges that the chisel was "reasonably fit" but points to the testimony that another tool was "proper" and the happening of the accident as sufficient "evidence" to support the verdict.

In *Puddu v. Royal Netherlands S.S. Corp.*, 303 F. 2d 752 (2 Cir.—1962); cert den. 371 U. S. 840, (1962), the majority found that the trial court had properly dismissed the longshoreman's claim for personal injuries allegedly resulting from unseaworthiness. Judge Clark also dissented in *Puddu*. Judge Clark felt secure in his belief that his interpretation of the *Mitchell* opinion's concept of unseaworthiness was the correct one, and viewed with apparent annoyance the unwillingness of other members of that Court to accept his interpretation.

Reiterating his position in the *Pinto* dissent, Judge Clark said:

> "So too, the decision seems inconsistent with the rationale of the doctrine of unseaworthiness as laid down by the Supreme Court in *Seas Shipping* v. *Sieracki*, 328 U. S. 85 and *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960)." (At page 758)

The "humanitarian" faction supports the theory that the purpose of the doctrine of seaworthiness is to pass the risk and the loss to those best able to bear it. This certainly

is insurer's liability as distinguished from the liability dependent upon "reasonably fit" tools and appliances. Admittedly, to effectuate insurer's liability, the *Mitchell* case must be read as Judge Clark advocates and as interpreted by Judge Hays in the case now before this Court.

In *Nuzzo* v. *Rederi A/S Wallenco*, 304 F. 2d 506 (2 Cir. 1962), the Court reversed the trial court's judgment in favor of the plaintiff longshoreman and remanded the case to the District Court for dismissal. The panel which decided *Nuzzo* understood that the *Mitchell* opinion does not require perfection and adhered to the reasonable fitness requirement. Judge Hincks wrote for the majority in *Nuzzo*:

> "* * * Just as the owner was under 'a duty only to furnish a vessel and appurtenances reasonably fit for their intended use', as was said in *Mitchell*, so the owner's duty, with respect to the stowage of the ship, is only to furnish a stowage reasonably fit for its intended purpose." (At pages 508, 509).

Judge Clark again dissented and said:

> "The fundamental rationale of unseaworthiness as an absolute liability is that the shipowner must bear the loss of injuries caused by unavoidable hazards", * * *. If 'reasonable fitness for their intended use' is to be read as the majority here has done, the shipowner will avoid liability whenever he can prove that he exercised reasonable care." (At page 512).

In spite of Judge Clark's feeling, litigants should be able to rely upon this court's language in *Mitchell* as meaning what it says.

The Second Circuit in *Ezekial* v. *Volusia S. S. Co.*, 297 F. 2d 215 (1961), Cert. den. 369 U. S. 843, (1962), affirmed dismissal of the seaman's case involving an injury to an

eye caused by rust. The Court found that there had been no showing that anything was wrong in the "quality or quantity of the ship's gear". Judge Clark again dissented.

It is respectfully submitted that the language of the *Mitchell* case is irreconcilable with the positions of Judge Hays in this case and the various dissenting opinions of Judge Clark.

Other decisions of the Second Circuit, such as *Richter* v. *Mathiasen's Tanker Industries*, 297 F. 2d 494, (1961); cert. den., 369 U. S. 843, (1962) and *Hooper* v. *Terminal Steamship Co.*, 296 F. 2d 281 (1961); cert. den., 369 U. S. 843, (1962) and *Blier* v. *United States Lines Company*, 286 F. 2d 920, (1961); cert. den., 368 U. S. 836, (1961), apply the same concept of "reasonable fitness for intended use".

Had the Court of Appeals in the present case applied the test for seaworthiness as set forth in the *Mitchell* case and as interpreted by the majority in *Nuzzo*, *Pinto*, *Richter* and *Ezekial*, and the other cases cited, it should have reversed the District Court's refusal to grant the defendant's motion for a directed verdict because of the lack of any probative evidence that the cold chisel was not "reasonably fit" to cut the end off the turnbuckle.

5. A Dismissal of the Unseaworthiness Claim Would Not Have Interfered With Plaintiff's Constitutional Guarantee of a Jury Trial.

The Seventh Amendment to the Constitution was never intended to "preserve trial by jury" unless there were some facts upon which the jury could base its verdict. If there were no probative facts from which a jury could reasonably infer, then the courts have the obligation of deciding the initial question of law, viz: Were there any probative facts upon which the jury could make the required reasonable inference? The Seventh Amendment never

meant to deprive the federal judges of their recognized power to direct a verdict because evidence was insufficient to support the inferences which a jury must make to arrive at a verdict. *Galloway* v. *United States*, 319 U. S. 372, (1943).

No case from this Court or any lower federal court has held that every case, regardless of a lack of probative facts must be determined by a jury.

In *Harris* v. *Pennsylvania Railroad Co.*, 361 U. S. 15, (1959), the plaintiff was injured when he slipped on grease on a railroad crosstie. This Court held that there was sufficient connection between the use of grease in the area of the crosstie and the occurrence of the injury, because plaintiff found grease on his shoes, to enable the jury to infer that the defendant had been negligent in the use of the grease as a lubricant.

Another situation where the facts permitted the jury to infer that the defendant had been negligent arose in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, (1944). There, the evidence showed that when the decedent was last seen he had disappeared behind the train in a direction of the trains intended subsequent movement. The engineer thereafter, without ringing the bell as required, moved the train in the direction where the decedent has last been seen. This was sufficient for a jury to reasonably conclude that the engineer acted negligently in moving the train when he had no reason to believe that the decedent could be anywhere other than in the path of the train's intended movement.

In *Schulz, Administratrix* v. *Pennsylvania Railroad Co.*, 350 U. S. 523 (1956), the district court directed a verdict for the respondent railroad on the grounds that while there was some evidence of negligence and an accidental death,

there was no evidence connecting the two. The Court of Appeals affirmed and this Court reversed.

The Court concluded that a jury could reasonably find the railroad negligent in requiring Schulz to work alone on dark ice covered boats, even though there was no direct evidence showing how he met his death. It was permissible for the jury to infer that Schulz had slipped on the ice in the darkness and fallen overboard.

In all those cases, the inference of negligence, could logically follow from the circumstances which preceded the injury or death. The instant case however presents an entirely different picture. Here there was absolutely no testimony that the chisel was not "reasonably fit for the purpose intended". That one tool is proper, without more, does not reasonably permit the inference that every other tool must be improper (therefore not reasonably fit) to perform the same task.

Where there are no probative facts to support a jury verdict, the trial court should exercise its right to direct a verdict.

In *Moore, Administratrix* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951), the decedent was killed when he fell from the platform or step of a railroad car, when the train stopped suddenly. There was no showing that any thing was wrong with the step from which the decedent fell and the engineer testified that he stopped after the decedent had fallen. This Court upheld the setting aside of the jury verdict in favor of the decedent and said:

> "* * * one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof". (At pages 577, 578)

In the instant case for the jury to conclude that the chisel was improper and not reasonably fit for its intended purpose, it (the jury) would have to infer that because there was one tool which was a proper tool to accomplish a given task, no other tool could possibly be reasonably fit, or proper to perform the same function. This would require the jury to reach a verdict without even a basis for speculation.

See also *Brady, Administratrix* v. *Southern Ry. Co.*, 320 U. S. 476 (1943), and *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329 (1948), where, after approving the setting aside of the jury verdict by the trial court, this Court said:

> "* * * the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her". (At page 330)

The trial court and the Court of Appeals for the Second Circuit failed to apply the "reasonable inference" test as set forth by this Court in Jones Act[1] and *FELA*[2] cases, when it permitted the jury to base a finding that a chisel was not "reasonably fit" on testimony that a hack-saw was proper where there was no evidence that the cold chisel, which was specifically manufactured to cut steel in the way in which the plaintiff used it, was in any way defective or not reasonably fit to perform the same function.

Conclusion.

It is of the utmost importance to the shipping industry to classify its responsibility under the warranty of seaworthiness.

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[1] 46 USC 688.
[2] 45 USC 51.

Unfortunately the opinion below and several dissenting opinions of the Court of Appeals for the Second Circuit do not follow the "reasonable fitness" test but place the shipowners' seaworthiness obligation much beyond, to the point of insurer liability.

The opinion below is the only opinion in which a ship has been held unseaworthy because of an accident caused by an admittedly "reasonably adequate" tool, solely because there was testimony that another tool was "proper" and an accident occurred during use of the "reasonably adequate" tool. Thus "reasonably safety" is made to mean a greater responsibility upon the shipowner by equating "safety" with being foolproof.

Since there was no probative evidence that the chisel was not reasonably fit, there was no evidence to support the jury verdict that the vessel was unseaworthy and consequently, the Seventh Amendment would not prohibit the district judge from directing a verdict for the defendant on the unseaworthiness claim.

Dated: June 3, 1963

Respectfully Submitted,

JOSEPH M. CUNNINGHAM,
Counsel for Petitioner.

VERNON S. JONES,
HENRY J. O'BRIEN,
Of Counsel

APPENDIX TO PETITION

ORIGINAL OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 62—October Term, 1962

(Argued October 22, 1962 Decided January 30, 1963)

Docket No. 27556

GEORGE E. STREET,

Plaintiff-Appellee,

ISTHMIAN LINES, INC.,

Defendant-Appellant.

Before:

DUMBAUD, Chief Judge,
MOORE and HAYS, Circuit Judges.

Appeal from a judgment for $35,000 entered in favor of the plaintiff by the United States District Court for the Southern District of New York, McGohey, J., after a trial by jury, for injuries resulting from negligence of defendant's agents and/or unseaworthiness. 46 U. S. C. §688.

Affirmed.

Opinion of the Court of Appeals.

JOSEPH M. CUNNINGHAM, of KIRLIN, CAMPBELL & KEATING, New York City (VERNON S. JONES, HENRY J. O'BRIEN, of counsel), for defendant-appellant.

ISRAEL G. SEEGER, of MILLER & SEEGER, New York City (ALBERT V. TESTA, of counsel), for plaintiff-appellee.

HAYS, Circuit Judge:

This is an appeal by defendant, Isthmian Lines, Inc., from a judgment for plaintiff after a trial before a jury. The action was brought by a merchant seaman engineering officer to recover damages for the loss of the sight of his left eye as the result of an injury sustained while aboard the S. S. Andrew Jackson, a vessel owned by the Waterman Steamship Company and bareboat chartered, operated and controlled by defendant.

Suit was predicated on the unseaworthiness of the vessel and on defendant's negligence under the Jones Act (46 U. S. C. 688). Plaintiff, employed by defendant as a junior third assistant engineer aboard the Jackson, had been going to sea since 1942. He had a Marine Engineer's license since 1949. On December 25, 1956, the vessel arrived in New Orleans after a voyage in the Far East and representatives of the owners of the vessel came aboard for the purpose of effecting redelivery. On the morning of December 26th, the work to which plaintiff was assigned was the removal of certain view plates from one of the vessel's boilers in order to permit the owner's representatives to examine the boiler. The only tools that plaintiff needed for this work were wrenches and a hammer. After plaintiff began to work on the boiler, the first assistant engineer locked all the tools in the tool shop with the exception of a few wrenches, a hammer and a cold chisel. On the day before, the first assistant engineer had found a sack of

valuable dies cached in the engine-room, hidden away apparently in preparation for theft. To safeguard the rest of the tools, he locked the tool room. At about 11:15 A. M. plaintiff was approached by two men, who plaintiff knew were not members of the crew but who appeared to him to be longshoremen. They showed him a turnbuckle and asked him to cut an end off. Plaintiff assumed that in cutting off the end of the turnbuckle for these men he would be helping the cargo operations. Accordingly, he agreed to do so and went to the machine shop to get a hacksaw. Finding none there, he went to the log desk, several feet away, looking for the toolroom key, which usually hung on a rack above the engineer's log desk. Not finding the key there, plaintiff started back to the machine shop and met the first assistant engineer on the way. He told the first assistant that he wanted a hacksaw to cut off the end of the turnbuckle "for these two fellows there", and asked him for the key to the tool shop. The first assistant told him that the key was in his room and that he was too busy to get it for him. Plaintiff did not attempt to get the key because, he testified, the first assistant kept his room locked and he did not have access to it nor permission to enter. He thereupon returned to the machine shop and found a cold chisel. He "figured I would do it as quick [with the chisel]. Then I had to dress it up on the emery wheel." He put an anvil on the deck, placed the turnbuckle on the anvil and, holding the turnbuckle down with the left foot, began to cut through the thin neck of the turnbuckle with the hammer and chisel. As he made the last cut, the end bounced off the surface of the anvil and struck him in the eye. At the end of plaintiff's case, the trial judge dismissed the unseaworthiness claim and reserved decision on the negligence question. At the end of the entire case, he advised counsel that he had reconsidered his previous dismissal of the unseaworthiness claim and was going to allow it to go to the jury along with the negligence claim.

Appellant contends that this was error, and that the complaint should have been dismissed in its entirety. We hold that both issues were properly submitted to the jury.

In the course of the trial "the first assistant engineer on the vessel, who had been going to sea since 1941, and had been an engineer since 1949, testified that a hacksaw was the "proper" tool to use for the purpose for which the plaintiff used the cold chisel, and that he would have used a hacksaw. Moreover, the plaintiff himself first went to look for a hacksaw, and resorted to the chisel and hammer only when he found that the hacksaw was not available." On the basis of this evidence and its own experience,[1] the jury, "which plays a pre-eminent role in these Jones Act cases,"[2] could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put.

Ferguson v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), a decision heavily relied on by the district court, is directly in point. There plaintiff, a baker, was injured in the course of using a butcher knife to remove from a container some ice cream which was too hard to be removed by the scoop ordinarily used for the purpose. Plaintiff recovered a verdict in the trial court, but this Court reversed and ordered dismissal. 228 F. 2d 891. The Supreme Court reversed our determination and ordered the verdict reinstated. After reviewing the evidence, the Court said:

> "Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (*Jacob* v.

[1] As Judge McGohey correctly stated in the course of the trial, the jury could *infer* "from what happened here, based on their own experience in life, that this kind of operation that this man did, whether he thought it was dangerous or not, was, in fact dangerous and that this tool was, in fact, inadequate to do that job safely."

[2] *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957).

New York City, 315 U. S. 752; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. See *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 526. Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in *Rogers* v. *Missouri Pacific R. Co.*, *ante*, p. 500, decided this day, is relevant here:

> 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'

Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. 'Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62." 352 U. S. at 523-24.

As in the case at bar, there was no defect in the tool selected, nor was the tool "unfit" in the sense that it could not accomplish the task. But as in the case at bar, the jury could

conclude from the circumstances of the accident that plaintiff "had been furnished no *safe* tool to perform his task", 352 U. S. at 523 (emphasis supplied).

In *Jacob* v. *New York City*, 315 U. S. 752 (1942), plaintiff was injured when the wrench he was using fell on his toe. In reversing a judgment dismissing the complaint the court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it." 315 U. S. at 752-53 (footnotes omitted).
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> "[I]*t was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work.* . . . Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this

case to the jury." 315 U. S. at 756 (emphasis supplied).[3]

See also *Salem* v. *United States Lines Co.*, 370 U. S. 31 (1962); *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478 (9th Cir. 1953); *affirmed*, 347 U. S. 396 (1954).

Appellant makes much of plaintiff's testimony, under cross-examination, that he did not, at the time, think it was dangerous to use a cold chisel as he did. This testimony, like other testimony, was for the jury to weigh and consider with the rest of the evidence. It did not, as appellant appears to contend, require the court to dismiss the complaint.

The burden of selecting proper tools is not upon the seaman. We agree with the statement of the rule in *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629 (5th Cir. 1957), cited with approval in *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 328 (1960). Cox was injured while using a block of the wrong type for the operation in which he was engaged. The charge of the trial court was held to be error:

> "Putting on the seaman, as it did, the burden of selecting gear, appliance and tackle to be used, or inspecting that furnished, by the vessel to ascertain whether it was suitable, it was a virtual abandonment of the traditional notions, long expressed, that the vessel is under an absolute duty to supply and keep in order tools and appliances, must furnish a seaworthy ship and seaworthy appliances. The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Mahnich v. Southern S.S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944, A. M. C. 1; Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A. M. C. 698. The obligation to furnish the gear was on the vessel. The bosun undertook to

[3] Although in both *Ferguson* and *Jacob* the complaint sounded only in negligence, it is clear that the rationale of the Court's opinions applies equally to claims of unseaworthiness.

> furnish it. If through the bosun the shipowner did not comply with the heavy obligation to provide seaworthy equipment, it was not the duty of the seaman to select it or pick from the good and bad." 247 F. at 635-36.

Appellant's remaining points are without merit.

Affirmed.